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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,
v.
National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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October 1994

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QUESTIONS PRESENTED

Whether the Virginia Supreme Court, by redeciding the precise federal question previously decided by the federal district court between the same parties, erred in not giving the earlier decision preclusive effect?

Whether the Virginia Supreme Court erred in finding, and then resolving, a perceived ambiguity in the legislative history of the Risk Retention Act so as to infer extraordinary qualifications, not plainly stated, for state courts in violation of the Tenth Amendment?

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IN THE SUPREME COURT OF THE UNITED STATES

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Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,

v.

National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The State Corporation Commission of the Commonwealth of Virginia respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia, (App., *infra*, at 1a-16a), is reported at 248 Va. 161 and at 444 S.E.2d 711. The opinion of the United States District Court for the Eastern District of Virginia, (*id.* at 17a-45a), is reported at 838 F. Supp. 1104.

JURISDICTION

The Virginia Supreme Court rendered its decision on June 10, 1994, (App., *infra*, at 16a), and denied the Petition for Rehearing, (*id.* at 49a), and issued its mandate (*id.* at 51a) on August 1, 1994 (*id.*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (West 1993).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 3902(a)(1)(H) of the Products Liability Risk Retention Act, 15 U.S.C. §§ 3901 through 3906, (App., *infra*, at 72a-88a) and the Tenth Amendment to the United States Constitution (the "Tenth Amendment"), which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,

are implicated here.

STATEMENT UNDER RULE 29.4(b)

Since this proceeding draws into question the constitutionality of certain provisions of the Risk Retention Act, 15 U.S.C. §§ 3901 through 3906, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

While there are parallel proceedings in federal court, no court of the United States, as defined by 28 U.S.C. § 451, has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT

In enacting the Risk Retention Act, Congress has provided for a regulatory framework in which State and Federal legislation are designed to work in conjunction with each other with regard to a unique type of insurer. Leaving to the states the task of regulating risk retention groups, in the main, the Risk Retention Act allocates various aspects of that responsibility between

chartering and non-chartering states. After, and despite, a well reasoned analysis of that framework by the Federal Court, which recognized the judicial role given to the Commission in that regulatory structure by Virginia's Constitution and General Assembly, the Virginia Supreme Court assigned to the Risk Retention Act an extraordinary interpretation that divested the Commission of its role and left the citizens of Virginia at a regulatory disadvantage compared to those of her sister states. The Virginia Supreme Court reached this result by addressing the interpretation to be given a term in the federal statute, though the issue had been resolved previously by the Federal Court in litigation between exactly the same parties in a closely related proceeding. The Virginia Supreme Court not only failed to give preclusive effect to the Federal Court's decision, but effectively overturned it by reaching a precisely contrary conclusion on the same federal question.

In June of 1993, the State Corporation Commission of the Commonwealth of Virginia (the "Petitioner" or the "Commission") entered an injunction (the "Injunction") against Respondent based on a finding that Respondent was financially impaired. (App., *infra*, at 47a-48a). Respondent appealed the issuance of the Injunction to the Virginia Supreme Court and, simultaneously, filed an action against the Commission and its individual members in the United States District Court for the Eastern District of Virginia (the "Federal Court") seeking relief from the Injunction. In the appeal to the Virginia Supreme Court and in the action before the Federal Court, Respondent alleged that because the Commission was not institutionally independent, it was not a "court of competent jurisdiction" under the Risk Retention Act and, therefore, it did not have jurisdiction to enter the Injunction. The Federal Court specifically held that the Commission could be a court of competent jurisdiction under the Risk Retention Act. (App., *infra*, at 45a). Approximately six months later, a majority of the Virginia Supreme Court, without giving effect to, or in any way acknowledging the Federal Court decision, held that (i) based on a perceived ambiguity in the Risk Retention Act, Congress had imposed federal qualifications on state judicial tribunals, and

(ii) the Commission was not a court of competent jurisdiction under the Risk Retention Act because it did not meet these perceived federal qualifications. (*Id.* at 11a). This case, therefore, presents the question of whether Congress can be held to have imposed on state courts qualifications beyond those established by the state's constitution and legislature.

A. Virginia Has Assigned the Relevant Jurisdiction to The State Corporation Commission

It is clear that the constitution and statutes of Virginia assign to the Commission the requisite jurisdiction for the Injunction. The Commission is a department of government of the Commonwealth of Virginia, established and empowered by constitutional and legislative fiat. *See* VA. CONST. ART. IX, §§ 1 and 2; VA. CODE ANN. §§ 12.1-12 and -13 (Michie 1993). The Commission is vested with legislative, executive, and judicial powers, and is the conduit by which the Commonwealth exercises its police power to regulate corporations doing business within the Commonwealth. *See, e.g., Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 224 (1908); *Winchester & S. R. Co. v. Commonwealth*, 55 S.E. 692, 693 (Va. 1906). When exercising its judicial powers, the Commission sits as a court of record possessing subject matter jurisdiction over the regulation of risk retention groups doing business in Virginia pursuant to Title 38.2, Chapter 51, of the Virginia Code. Included within this grant of jurisdiction is the power to conduct hearings, impose penalties for violations of Title 38.2, issue orders, and revoke a risk retention group's authority to do business in Virginia. *See* VA. CODE ANN. §§ 38.2-5100 and -5111 (Michie 1994). In addition to the powers and authority conferred upon Virginia courts by general law, the Commission also has the power to impose and enforce any penalty, civil or otherwise, against any person who violates any provision of the Virginia Insurance Code. VA. CODE ANN. § 38.2-220 (Michie 1994).

B. Proceedings Below

Where a risk retention group is found to be impaired, a state may require that it comply with an injunction issued by a "court of competent jurisdiction." 15 U.S.C. § 3902(a)(1)(H) (West Supp. 1994). The Risk Retention Act further provides that "nothing in [section 3902] shall be construed to affect the authority of any Federal or State court to enjoin" the sale of insurance or operation by a risk retention group that is financially impaired. 15 U.S.C. § 3902(e)(2). After hearing testimony, receiving evidence, and entertaining arguments of counsel, the Commission found that Respondent was financially impaired and issued the Injunction which partially enjoined Respondent from writing any new insurance business in the Commonwealth of Virginia. (App., *infra*, at 47a-48a).

Thereafter, Respondent perfected an appeal of the Injunction to the Virginia Supreme Court. During the pendency of this appeal, Respondent filed an action in the Federal Court also seeking relief from the Injunction. Before the Virginia Supreme Court and before the Federal Court, Respondent alleged, *inter alia*, that Petitioner was not a "court of competent jurisdiction" as the phrase is used in the Risk Retention Act.

The Federal Court noted that the Risk Retention Act does not define the phrase "court of competent jurisdiction" and that there do not appear to be any reported cases defining the phrase within the meaning of the Act. (*Id.* at 33a). Relying on this Court's decision in *Park N' Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (statutory analysis begins "with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose"), the Federal Court found that the phrase should be given its ordinary meaning. Relying upon this Court's decision in *United States v. Morton*, 467 U.S. 822, 828 nn.6-7 (1984), the Federal Court noted that the phrase "court of competent jurisdiction" normally refers to courts having subject matter jurisdiction. The Federal Court then noted that the

Commission's subject matter jurisdiction "extends to issues of state-wide concern". (App., *infra*, at 33a (quoting *Atlas Underwriters, Ltd. v. State Corporation Comm'n*, 375 S.E.2d 733, 734 (Va. 1989)). Finally, the Federal Court noted that the Commission has specific regulatory jurisdiction over risk retention groups pursuant to Virginia Code sections 38.2-5110 *et seq.* (App., *infra*, at 34a). The Federal Court then considered whether the Commission is a court. Relying on this Court's decisions in *Roudebush v. Hartke*, 405 U.S. 15, 21 (1972) and *Hill v. Martin*, 296 U.S. 393, 397-98 (1935), the Federal Court found it "apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a 'state court of competent jurisdiction'". (App., *infra*, at 34a). Relying on decisions from this Court, the Virginia Supreme Court, and other courts, the Federal Court found that, under Virginia law, it is well-settled that the Commission may function as a court. (*Id.* at 34a (citing *Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 224 (1908); *Atlas Underwriters, Ltd. v. State Corp. Comm'n*, 375 S.E.2d 733, 734 (Va. 1989); *Virginia Nat'l Bank v. Virginia*, 320 F. Supp. 260, 262 (E.D. Va. 1970), *appeal dismissed*, 448 F.2d 425 (4th Cir. 1971)). On December 3, 1993, the Federal Court decided that:

> unquestionably, then, the SCC may function as a 'court of competent jurisdiction' within the meaning of the Act.

(App., *infra*, at 35a).

Approximately six months later, a majority of the Virginia Supreme Court (the "Majority"), addressed the precise federal question previously decided by the Federal Court and found the statutory phrase "court of competent jurisdiction" to be ambiguous. Relying on this Court's decision in *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 23-24 (1982), the majority considered the Risk Retention Act's legislative history, though no statutory ambiguity could be identified without reference to such history. (App., *infra*, at 8a-

10a). Next, the Majority relied on this Court's decisions in *Rice v. Rehner*, 463 U.S. 713, 728 (1983) and *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) in considering the interpretation of the Risk Retention Act's sponsor. (App., *infra*, at 10a). Based on a review of the legislative history and the statements by the Risk Retention Act's sponsor, the court reasoned that "Congress intended that a 'court of competent jurisdiction' be 'an independent judicial officer'". (*Id.*). Finally, the Majority reasoned that "[i]n contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided," Congress required something more of state courts under the Risk Retention Act. (*Id.* at 11a).

Justice Lacy, with whom Chief Justice Carrico and Justice Whiting joined, dissented from the Majority's conclusion that the Commission was not a court of competent jurisdiction within the meaning of the Risk Retention Act. (App., *infra*, at 12a-16a). In such dissent, these justices noted the Majority's disregard for the Federal Court decision, and agreed with the Federal Court's rejection of "the same position" Respondent raised before the Virginia Supreme Court. (*Id.*). The dissenting opinion, relying on this Court's reasoning in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), noted that "[i]t is well-settled that legislatures use words or expressions in their commonly understood meaning, unless a contrary intent is expressed." (*Id.* at 13a). The dissenting opinion also observed that, based on prior cases of the Virginia Supreme Court and the statutes and Constitution of Virginia, "there can be no dispute that the Commission can operate as a 'court'. The Commission, therefore qualifies as a 'court of competent jurisdiction' under the usually understood sense of the phrase." (*Id.*). The dissenting opinion noted that:

> The majority's conclusion is based on its definition of "independent judicial officer" as a structural separation between the entity issuing the injunction and the insurance commissioner. This definition is not found in either instance the phrase appears in the

> legislative history. 132 Cong. Rec. 16,777; 29,090. The phrase was not addressed or discussed by the Bill's sponsor or in the Senate report.

(*Id.* at 16a). After analyzing the Risk Retention Act and its legislative history, Justice Lacy stated that neither the statute itself nor the legislative history supported the Majority's construction of the Risk Retention Act. (*Id.*).

In its Petition for Rehearing, the Commission emphasized its concern that, under settled principles of issue preclusion, Respondent was barred from presenting the issue of whether the Commission was a court of competent jurisdiction under the Risk Retention Act in light of the Federal Court decision. (App., *infra*, at 59a-60a). Additionally, the Commission argued that the Risk Retention Act, as construed by the Virginia Supreme Court, violates the Tenth Amendment. (App., *infra*, at 64a-66a). In a one-sentence order, the Virginia Supreme Court denied the Commission's Petition for Rehearing. (App., *infra*, at 49a).

During the pendency of Respondent's appeal to the Virginia Supreme Court, Respondent also filed an appeal (the "Federal Appeal") of the Federal Court decision with the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). The Federal Appeal was placed in abeyance pending a decision by the Virginia Supreme Court in this matter. After the Virginia Supreme Court's decision was rendered, Respondent filed a Motion to Remand with Instructions to Vacate in the Federal Appeal arguing that the decision by the Virginia Supreme Court made the Federal Appeal moot. On October 13, 1994, the Fourth Circuit entered its Order remanding the case to the Federal Court with instructions to dismiss the case as moot. (App., *infra*, 89a - 90a.)

C. Federal Questions Presented to the Virginia Supreme Court.

The federal questions presented here were properly raised before the Virginia Supreme Court. In its initial brief to that Court, the Commission urged the dispositive effect of the Federal Court's decision that the Commission is a court of competent jurisdiction. Specifically, the Commission stated that the Federal Court's holding that the Commission was unquestionably a court of competent jurisdiction disposed of Respondent's first assignment of error to the Virginia Supreme Court. Commission's Brief at 12. While the Commission did not specifically mention either claim preclusion or issue preclusion, this Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). Thus, this Court has jurisdiction over this case. Indeed, as this Court has stated:

> provisions declaring the supremacy of the Constitution and the extent of judicial power . . . confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts.

Stoll v. Gottlieb, 305 U.S. 165, 167 (1938).

Even if the federal questions were deemed to have been raised for the first time in the Petition for Rehearing, this Court would have jurisdiction to review the decision from the Virginia Supreme Court. Assuming that there is a procedural bar in Virginia against raising questions for the first time in a petition for rehearing, the Virginia Supreme Court has recognized an exception to this bar for the presentation of constitutional questions first raised in a petition for rehearing. *See Trust Co. v. Commonwealth*, 145 S.E. 326, 327 (Va. 1928) (where the Court considered an issue precisely because it fell within such an exception), *rev'd sub nom. Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929). Thus, neither of the questions presented here comes within any purported procedural bar under Virginia law.

Moreover, "a state procedural ground is not adequate unless the procedure is strictly or regularly followed . . . state courts may not avoid deciding federal issues by invoking procedural rules they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). Assuming that such a procedural bar exists in Virginia, the Virginia Supreme Court does not consistently apply it. *See, e.g., Petrus v. Robbins*, 83 S.E.2d 408, 414-17 (Va. 1954) (Spratley, J., dissenting). Thus, even if certain questions were presented for the first time in the Commission's Petition for Rehearing, this is of no moment under this Court's decision in *Hathorn v. Lovorn*.

REASONS FOR GRANTING THE PETITION

The Virginia Supreme Court, in conflict with this Court's well-settled jurisprudence, failed to give any preclusive effect to the Federal Court's judgment and redecided the exact federal question already decided by the Federal Court. Moreover, the Virginia Supreme Court's decision below is erroneous because (i) that court has improperly based the disruption of the usual balance of federal and state powers on the grounds of ambiguity rather than on any plain or clear statement by Congress that such disruption was intended, and (ii) that court has unnecessarily interpreted a federal statute in a manner which produces a violation of the Tenth Amendment to the United States Constitution.

I. The Decision of the Virginia Supreme Court Casts Substantial Doubt not Only on the Enforceability of Certain Key Provisions of the Risk Retention Act, but More Fundamentally, on the Ability to Establish and Govern its Own Courts.

Under the Rules of this Court, one factor which may cause this Court to grant certiorari where it otherwise would not is where a state court decides a federal question in conflict with decisions of this Court. Sup. Ct. R. 10(c). This Court has previously reversed or vacated state court judgments which either

were contrary to this Court's decisions or misread this Court's precedent. *See, e.g., Powell v. Nevada*, __ U.S. __, 114 S. Ct. 1280 (1994) (vacating state court judgment which misread this Court's precedent); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (reversing state court judgment contrary to decision by this Court). This Court should do no less here where a state court of last resort has decided three substantial federal questions in direct conflict with this Court's jurisprudence. Indeed, this case presents an uncanny twist of federalism principles; to wit: a state court has, under the United States Constitution and this Court's doctrines, improperly given no effect to the final judgment of a federal court and too great an effect to the limited powers of the federal legislature with respect to state courts.[1]

The Virginia Supreme Court has found in the Risk Retention Act an intention and, more fundamentally, an ability by Congress to impose federal conditions on the States' establishment of its judicial bodies. Such a substantial disruption of the powers reserved by the Constitution to the States should not have been presumed for two reasons: (1) there is no plain statement of such intention in the Risk Retention Act;[2] and (2) Congress may not do so under the Constitution and this Court's decisions. If such a construction were allowed to rest on the flimsy reed of ambiguity, this Court's plain statement jurisprudence would be seriously

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[1] Specifically, the lower court's construction of the Risk Retention Act places federal regulatory requirements on the States regulating risk retention groups. Such federal regulation was never intended by Congress. *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1487 & n.39 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986) (without deciding "whether Congress could require a state official to act as a surrogate federal insurance commissioner", concluding under the Risk Retention Act of 1981, that "no federal regulatory requirements are placed on the insurance commissioner (or the state agency)").

[2] As this Court has stated, no court should assume that Congress lightly exercises its powers to legislate under the Supremacy Clause of the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Virginia Supreme Court has erroneously done just that.

undermined here. Moreover, if Congress were granted such extraordinary powers, the ramifications on every State's establishment of its judiciary -- a power reserved to the States since the early days of this Nation -- would be disastrous.

By granting certiorari and either considering the merits of this matter or summarily reversing the Virginia Supreme Court's decision, this Court can correct these patent constitutional infractions. This Court should do so.

II. The Virginia Supreme Court's Failure to Give Deference to the Federal Court Decision, in Derogation of Settled Principles of Federalism, is in Direct Conflict with Established Jurisprudence of this Court.

The Federal Court decided that:

> Unquestionably, then, the SCC may function as a "court of competent jurisdiction" within the meaning of the Act.

(App., *infra*, 35a).

Approximately six months thereafter, the Virginia Supreme Court decided that:

> we hold, that for purposes of the Act only, the Commission, as a regulatory tribunal, is neither an "independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress.

(App., *infra*, at 11a). As this Court has observed, "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll*, 305 U.S. at 173. The litigation of the question presented to the Federal Court should have ended when that court decided this question. Instead, the

Virginia Supreme Court allowed it to continue and forced the Commission to litigate the same question twice.

"State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law." *Heck v. Humphrey*, __ U.S. __, __, 114 S. Ct. 2364, 2373 (1994). Under well-settled federal law, the pendency of an appeal does not diminish the preclusive effect of a judgment rendered by a federal court. *See, e.g., Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188-89 (1941) (in federal courts, general rule long recognized that appeal does not detract from judgment's decisiveness and finality) (citing *Deposit Bank v. Frankfort*, 191 U.S. 499, 520 (1903)).

In *Stoll v. Gottlieb*, 305 U.S. 165 (1938), this Court considered the propriety of a state court's denial of preclusive effect to a bankruptcy court's decision. There, this Court specifically found that, even if the federal court had decided a question erroneously, "its determination of that matter was conclusive upon the parties before it, and could not be questioned by them. . . ." 305 U.S. at 175. In the case at bar, the question of whether the Commission may be a court of competent jurisdiction under the Risk Retention Act was settled by the Federal Court. Under the explicit teachings of this Court, it was improper for Respondent to raise, and for the Virginia Supreme Court to reconsider, this issue. *See, e.g., Stoll v. Gottlieb*, 305 U.S. at 165 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); *Crescent City Live-Stock Landing and Slaughter-House Co. v. Butchers' Union Slaughter-House and Live-Stock Landing Co.*, 120 U.S. 141 (1887). Just as this Court reversed the decision of the Supreme Court of Illinois in *Stoll*, so must it now reverse the decision by the Virginia Supreme Court. "Any other conclusion strikes down the very foundation of the doctrine of res judicata. . . ." *Deposit Bank*, 191 U.S. at 520. In light of this well-established law, it is "unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H.

COOPER, FEDERAL PRACTICE and PROCEDURE § 4468 (1981). Here, the unthinkable has occurred.

Because the majority of the lower court has disregarded the decision of the Federal Court, in direct conflict with this Court's settled jurisprudence, this Court should grant the Writ of Certiorari and either consider the merits of this matter or summarily reverse the Virginia Supreme Court's decision.

III. The Virginia Supreme Court's Construction of the Risk Retention Act is Contrary to this Court's "Plain Statement" Jurisprudence and Causes the Risk Retention Act to Violate the Tenth Amendment to the United States Constitution.

A. Any Intention by Congress to Disrupt the Constitutional Balance of Power between State and Federal Governments must be Clear on the Face of the Statute and May Not Rest on Mere Ambiguity.

Under the Tenth Amendment, the powers not delegated to the United States or prohibited to the states are reserved to the states or to the people. As this Court noted as early as 1798,

> establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province, and duty of the State Legislatures . . . .

Calder v. Bull, 3 U.S. 386, 387 (1798). Indeed, the power of a state to prescribe the qualifications of its own judicial officers "should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Gregory v. Ashcroft, 501 U.S. at 460. A more fundamental intrusion into state sovereignty is present here than was considered in *Gregory v. Ashcroft*. Under the lower court's decision, Congress has established and imposed a federal framework on the States' judiciary system in the context of the States' regulation of financially troubled risk retention groups. There is simply no plain provision in the United States Constitution which would allow Congress to dictate to the states the structure and function of its judicial bodies. Thus, the lower court's construction of the relevant provisions of the Risk Retention Act, to the extent that it finds a Congressional intent to dictate to the states certain requirements regarding its judicial system, prompts serious constitutional questions. This Court can, however, avoid the potential constitutional problem by applying the plain statement rule. *See, e.g., Gregory v. Ashcroft*, 501 U.S. at 460-465. The direct applicability of the *Gregory v. Ashcroft* plain statement rule to the case at bar is made clear by a recent discussion of that decision by Justice Scalia:

> in *Gregory v. Ashcroft*, . . .we said that unless it was clear that the term "appointee[s] on the policymaking level" did not include judges we would construe it to include them, since the contrary construction would cause the statute to intrude upon the structure of state government, establishing a federal qualification for state judicial office. Such intrusion, we said, requires a "plain statement" before we will acknowledge it.

Chisom v. Roemer, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting).

Under the plain statement rule, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language in the statute." *Gregory v. Ashcroft*, 501 U.S. at 460. Indeed, Congress should make its intention clear and

manifest if it intends to pre-empt the historic balance of federal and state powers. *Id.* One of the tenets on which the plain statement rule stands is that no court should assume that Congress lightly exercises its powers to legislate under the Supremacy Clause of the Constitution. *Id.* (citing U.S. Const. art. VI.) Indeed, the "plain statement rule" merely acknowledges that "the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.*

Just last term, this Court stated that, when Congress intends to displace traditional state regulation, this federal purpose must be "clear and manifest." *BFP v. Resolution Trust Corp.*, _ U.S. __, __, 114 S. Ct. 1757, 1765 (1994). Where such Congressional intent is doubtful, "our federal system demands deference to long-established traditions of state regulation." *Id.* at __, 114 S. Ct. at 1765-66.

In essence, the Virginia Supreme Court, based on what it found to be an ambiguity,[3] determined that Congress had placed federal conditions on Virginia's establishment of its judicial tribunals in the context of regulating a risk retention group. As this Court has noted, "to give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which [this Court has] relied to protect states' interests." *Gregory v. Ashcroft*, 501 U.S. at 465. In fact, this Court has specifically stated that even if a statute is ambiguous, it will not attribute to Congress any intention of intruding on state governmental functions. *Id.* at __, 111 S. Ct. at 2406. Similarly, the Virginia Supreme Court should not have

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[3] Petitioner argued (*see* Brief of State Corporation Commission to Virginia Supreme Court at 22; App., *infra*, at 61a) and the Federal Court, relying on this Court's decisions concerning statutory construction, (App., *infra* at 33a), found that the phrase "court of competent jurisdiction" was intended by Congress to have its plain and ordinary meaning. Nonetheless, the Virginia Supreme Court simply noted that the Risk Retention Act does not define the phrase and summarily stated that the phrase was ambiguous. (App., *infra*, at 8a).

found such intrusion by Congress based merely on some purported ambiguity in the Risk Retention Act.

Upon application of the plain statement rule, it becomes apparent that the lower court has incorrectly read into the Risk Retention Act an intention by Congress to impose requirements on Virginia's judicial officers in contrast to those contemplated under the Virginia constitutional and statutory framework. Thus, this Court should grant the Writ of Certiorari and either review the merits of this case or summarily reverse the lower court's decision.

B. As Construed by the Virginia Supreme Court, the Questioned Provisions of the Risk Retention Act Violate the Tenth Amendment.

This case is not one where Congress has subjected a State to the same legislation applicable to private parties. *New York v. United States*, __ U.S. __, __, 112 S. Ct. 2408, 2420 (1992). Rather, this matter involves the circumstances under which Congress may direct or motivate the State to regulate risk retention groups in a particular fashion. *Id.*[4] Specifically, the question here is whether Congress may impose on the States federal requirements in establishing regulatory tribunals in each state. This Court has noted that the Framers of the Constitution "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *New York v. United States* at __, 112 S. Ct. at 2423. Accordingly, under this Court's decision in *New York v. United States*, Congress may not regulate the States in the manner in which the lower court's decision would allow.

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[4] Thus, the "unsteady path" referenced in *New York v. United States* need not be trod here. *See id.* (comparing, *inter alia*, *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

This Court recently noted that "the authority of the people of the States to determine the qualifications of their government officials may be inviolate." *Gregory v. Ashcroft*, 501 U.S. at 453. Under the Virginia Supreme Court's construction of the Risk Retention Act, Congress has violated an even more basic aspect of state sovereignty by placing federal requirements on state tribunals in the context of regulating risk retention groups. This Court's decision in *New York v. United States*, __ U.S. __, 112 S. Ct. 2408 (1992) reveals why Congress may not do so under the Tenth Amendment. In that case, this Court considered whether Congress could direct or otherwise motivate states to regulate in a particular manner. *Id.* at __, 112 S. Ct. at 2420. There, it was said that:

> [w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

New York v. United States, __ U.S. __, __, 112 S. Ct. at 2421 (1992). Neither may the Constitution be read to grant Congress the power to impose federal conditions on the framework of the States' judiciary system.

Under the Virginia Supreme Court's improper construction of the Risk Retention Act, Congress intended to place federal qualifications on state judicial bodies "[i]n contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided,..." (App., *infra*, at 11a). As was true in *New York v. United States*, the Constitution simply does not empower Congress to subject state governments to this type of direction. _U.S. at __, 112 S. Ct. at 2428. Consequently, the provisions of the Risk Retention Act in question, as interpreted by the lower court, are unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari and either consider the merits of this matter or summarily reverse the Virginia Supreme Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick H. Cantilo, a member of the bar of this Court, hereby certify that on this 28th day of October, 1994, three copies of the Petition for Writ of Certiorari in the captioned matter were mailed, first class postage prepaid, to each of the following persons:

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I further certify that all parties required to be served have been served.

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